SUPREME COURT, U. S.
Office-Supreme Court, U.S.
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JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 357

UNITED STATES,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

MEMORANDUM IN OPPOSITION TO MOTION BY *AMICUS CURIAE* FOR A REHEARING, AND, IF GRANTED, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Respondent, Consolidated Edison Company of New York, Inc., opposes the motion made by Mr. A. Chauncey Newlin "as amicus curiae and in behalf of taxpayers generally * * * for a rehearing of this case", for the following reasons:

I

The Applicant Has No Standing in This Case Before This Court

The judicial power and appellate jurisdiction vested in this Court by the Constitution[1] extends only to "cases" and "controversies"; i.e., it is limited to the determination

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[1] Article III, Section 2.

of justiciable issues in an actual controversy between parties.[2] Mr. Newlin, the applicant, is not a party in this case, nor is there present a justiciable issue in an actual controversy between him and either of the parties herein.

Although Rule 42 of the rules of this Court, permits a person, not a party to a proceeding in this Court, under certain circumstances and upon compliance with specified preconditions, to file a brief as *amicus curiae*, it does not elevate such person to the status of a party to the "controversy" so as to enable him to seek to reopen a proceeding in this Court which has been duly heard and terminated by a final decision of the Court. So to extend the Rule in the present application of Mr. Newlin, would establish a precedent whereby any taxpayer, dissatisfied with a final determination of this Court, could, as a self-appointed amicus curiae, move for a rehearing of the case in which the decision and judgment was rendered contrary to his views.

Moreover, even if such a precedent were desirable—which it is not—the applicant, by this motion, seeks to do indirectly that which he is barred from doing directly. Though labelled a motion for a rehearing, it is, in effect, a motion for a declaratory judgment "in behalf of taxpayers generally" upon whom "[t]he decision for the Respondent [in the present case] will mean a hardship * * * [and] whose case, as such, was not presented to the Court". The Declaratory Judgment Act,[3] however, specifically excepts therefrom any determination "with respect to Federal taxes".

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[2] *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 242-244 (1952); *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227 (1937); *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 723-724 (1929).

[3] 28 U. S. C. § 2201.

II

The Applicant's Motion is Untimely and Fails to Comply with the Rules of this Court

Considering the applicant's motion solely in the light of the Rules of this Court, it is untimely and fails to comply with those rules, whether it be considered (1) a motion for rehearing, as the applicant entitles it, or (2) a motion for leave to file a petition for rehearing as amicus curiae, as the Clerk of this Court characterizes it.[4]

The Government's petition for certiorari was filed August 23, 1960; certiorari was granted November 14, 1960; argument was heard on April 24, 1961; the unanimous decision and judgment of this Court was rendered on May 22, 1961; and it became final during the October 1960 Term, on June 16, 1961, when the Government failed to petition for a rehearing. The present motion was filed with the Clerk of this Court on September 19, 1961 after the October 1960 Term had ended.

As a motion for rehearing it is untimely. Rule 58(1). Indeed, Rule 58(4) provides that "petitions for rehearing that are out of time under this rule, will not be received."

As for persons appearing as *amicus curiae* in a proceeding before this Court, Rule 42 specifically sets forth the time and the requisite conditions under which it may be done. The applicant could have availed himself of either Rule 42(1) prior to the consideration by the Court of the

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[4] In his letter to Mr. Newlin, copy of which was forwarded to counsel for Respondent, the Clerk acknowledged the receipt of "40 copies of your motion for leave to file a petition for rehearing as amicus curiae."

Government's petition for writ of certiorari,[5] or Rule 42(2) with respect to filing a brief on the merits by a timely application after the Government's petition for certiorari was granted. He did neither. As an application as *amicus curiae* it is also untimely. Moreover, as an *amicus curiae* pleading it is defective in that no request was ever made for Respondent's consent to applicant's appearance in this proceeding as *amicus curiae* nor has the applicant stated the nature of his interest as required by Rule 42(3).

III

The Basis upon which the Applicant Seeks a Rehearing Has no Merit

The applicant bases his motion on the ground that a third alternative for the solution to the problem presented in this case had not been argued before this Court. The following was the question presented: in the light of the decision in *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516 (1944), that a contested tax liability does not accrue until the contest is terminated, when, and to what extent, does a contested local tax liability, which is involuntarily paid during the contest, accrue and become deductible under Section 23(c)(1) of the Internal Revenue Code of 1939? The Government argued that it accrues and is deductible in the year it is paid, in the amount of the payment. The Respondent argued that it accrues and is deductible in the year the contest is terminated, in the amount then determined to be due.

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[5] The applicant, as counsel for the New York Telephone Company, which had a similar claim against the Government, had availed himself of this provision in *Consolidated Edison Company of New York, Inc.* v. *United States*, No. 695, October Term, 1955, where a writ of certiorari to the United States Court of Claims was sought. We understand that the Telephone Company settled its claim against the Government for $1,000,000 before Respondent had successfully prosecuted its appeal in the Court below.

The applicant maintains that neither of these alternatives is correct;—that the amount ultimately determined to be due should be related back to the year for which it was assessed and should be allowed as a deduction in that year. The Commissioner took this position in *Stanard-Tilton Milling Co.*, 3 T. C. 1026, 1029-30 (1944) (second issue) but was overruled because it was contrary to the principle enunciated by this Court in *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281 (1944),—that an event must be reflected in the year it occurs and may not be related back to an earlier year in which the transaction, out of which it arose, took place. (acq. CB 1949-1, 3.) The principle for which the applicant contends is contrary to both *Dixie Pine* and *Security Flour Mills;* and his reliance upon *Bartlett* v. *Delaney*, 173 F. 2d 535, is misplaced on two counts, namely, (1) it involved a cash basis taxpayer and (2) the taxpayer had *voluntarily* elected to pay the asserted deficiency when he could have refused payment and contested its validity by filing a petition in the Tax Court.

Conclusion

It is respectfully urged that the motion be stricken from the records of this Court and returned to the applicant because he has no standing in this case for the making of this motion, and that to give it recognition by passing thereon would set a precedent for any person, who may hereafter be dissatisfied with a decision of this Court, to come into this Court and make a similar motion. Failing such disposition, the motion should, in any event, be denied because of the above reason and also because the motion is untimely, contrary to the Rules of this Court and without merit.

Respectfully submitted,

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